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IN THE
COURT OF APPEALS OF INDIANA

MARK ESTANISLAU,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A01-0606-CR-235
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc Kellams, Judge
Cause No. 53C02-0505-FC-261

May 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following his guilty plea, Mark Estanislau appeals his convictions of four counts of robbery, all Class C felonies. Estanislau raises two issues, which we restate as whether the trial court abused its discretion in denying Estanislau's motion to withdraw his guilty plea, and whether the trial court denied Estanislau due process when it issued its restitution order. Concluding that the trial court did not abuse its discretion in denying Estanislau's motion to withdraw his guilty plea, and that the trial court's order of restitution did not deny Estanislau due process, we affirm.

Facts and Procedural History

During a span of roughly three and one half months, Estanislau and Robert Lewellen committed four bank robberies in the area of Bloomington, Indiana. The pair robbed a Member's Choice Credit Union on November 30, 2004, December 22, 2004, and March 14, 2005. They robbed Bloomfield State Bank on January 28, 2005. In each instance, Estanislau entered the bank with some sort of covering over his face, gave a note to a teller demanding money, and left the bank with money.

Estanislau pled guilty to all four counts on April 10, 2006. There was no written plea agreement, but at the guilty plea hearing, the State stipulated that two of the robberies were part of a single episode of criminal conduct, and that the other two robberies were part of a single episode of criminal conduct.[1] At the guilty plea hearing, the trial court explained the

[1] Under Indiana Code section 35-50-1-2, the aggregate sentence for conduct constituting a single episode of criminal conduct, except in situations involving "crimes of violence," may not exceed the advisory

potential sentence for the crimes to Estanislau, who indicated his understanding. The trial court also informed Estanislau that by pleading guilty he was waiving certain rights, and explained those rights. Again, Estanislau indicated his understanding. Estanislau then pled guilty to all four counts, and informed the trial court that he was doing so freely and voluntarily. The trial court accepted Estanislau's guilty plea and entered judgments of conviction for four counts of robbery.

On May 11, 2006, Estanislau filed a Verified Motion to Withdraw Guilty Plea, stating that his plea was not voluntary. The trial court orally denied this motion at Estanislau's sentencing hearing on May 18, 2006. At this hearing, the trial court sentenced Estanislau to five years for each robbery, and ordered that the sentences run consecutively for an aggregate sentence of twenty years. At the sentencing hearing, the following exchange occurred regarding restitution.

> State: There is some restitution owed and I understand it will be placed on the judgment docket. I do have specific figures from Member's Choice, but for some reason I don't have the Bloomfield State figure with me. If I may present that to the Court tomorrow or the later part of today.
> Court: What is the Member's Choice amount?
> State: The Member's Choice total amount for three robberies at Member's Choice is $18,707.
> Court: No money was recovered?
> State: No money was recovered, Judge.
> Court: Goodness, okay. And you don't know the Bloomfield State Bank amount?
> State: Bloomfield State I estimate is around $3,700 from my recollection but I can run downstairs. I have that figure there.
> Court: What position do you take on that, Mr. Miller, on behalf of your client?
> Mr. Miller: Obviously, we're not in a position to challenge the claim for

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sentence for the Class of felony that is one level higher than the most serious felony of which the defendant is convicted.

restitution.
Court: Okay and does this $18,707 sound about right for Member's Choice?
Estanislau: Yes.
Court: And roughly $3,700 or so for Bloomfield?
Estanislau: (inaudible)
Court: Okay. You'll get an exact figure for me? Thank you.

Transcript at 171-73. On May 23, 2006, the prosecutor sent the trial court an e-mail indicating that $18,707 was owed to Member's Choice and $3,750 was owed to Bloomfield State Bank. The trial court issued a Restitution Order on June 14, 2006, ordering Estanislau to pay restitution in these amounts. Estanislau now appeals his convictions and the restitution order.

Discussion and Decision

I. Guilty Plea

A. Standard of Review

"After entry of a plea of guilty . . . but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea of guilty . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea." Ind. Code § 35-35-1-4(b). The party seeking to withdraw the guilty plea must establish the grounds for relief by a preponderance of the evidence. Ind. Code § 35-35-1-4(e). The trial court's decision to deny a motion to withdraw a guilty plea "arrives in this Court with a presumption in favor of the ruling." Coomer v. State, 652 N.E.2d 60, 62 (Ind. 1995). We will reverse the trial court's ruling on such a motion only if we conclude the trial court abused its discretion. Ind. Code § 35-35-1-4(b); Bland v. State, 708 N.E.2d 880, 882 (Ind. Ct. App. 1999). We will conclude the trial court abused its discretion if the defendant shows

that manifest injustice has occurred. See Ind. Code §35-35-1-4(b); Bland, 708 N.E.2d at 882.

B. Trial Court's Denial of Estanislau's Motion to Withdraw Guilty Plea

Estanislau argues that his plea was not voluntary because there was "a complete breakdown in the attorney client relationship," and the plea agreement was not in writing. Appellant's Brief at 5. Although ineffective assistance of counsel is a valid reason for withdrawing a guilty plea, Gillespie v. State, 736 N.E.2d 770, 775 (Ind. Ct. App. 2000), trans. denied, Estanislau has wholly failed to explain how his counsel was ineffective. Estanislau merely cites to various parts of the transcript, which reveal animosity existing between him and his attorney, but does not explain how this animosity made his guilty plea involuntary. See Coomer, 652 N.E.2d at 63; Barnes v. State, 738 N.E.2d 1093, 1096 (Ind. Ct. App. 2000), trans. denied.

With regard to the lack of a written plea agreement, Indiana Code section 35-35-3-3(a)(1) indicates that "[n]o plea agreement may be made by the prosecuting attorney to a court on a felony charge except . . . in writing." However, we have held that in some situations when a trial court accepts an oral plea agreement, such an agreement is enforceable.[2] See Shepperson v. State, 800 N.E.2d 658, 659-60 (Ind. Ct. App. 2003). Moreover, the trial court in this case sentenced Estanislau in accordance with the oral plea agreement. Finally, Estanislau has wholly failed to explain, and we fail to see, how the lack of a written agreement made his plea involuntary.

[2]An oral agreement is to be enforced if the State has materially benefited from it or the defendant has relied upon it to his or her detriment. Badger v. State, 637 N.E.2d 800, 804 (Ind. 1994).

The trial court clearly informed Estanislau of his rights and the consequences of his guilty plea, and Estanislau indicated that he understood these rights and consequences. We conclude that the trial court's denial of Estanislau's motion to withdraw his guilty plea did not result in manifest injustice.

II. Restitution Order[3]

Estanislau argues that by issuing its restitution order without holding a hearing at which Estanislau was present, the trial court deprived him of his due process rights under the Fourteenth Amendment to the United States Constitution.

Under both the federal and Indiana constitutions, a criminal defendant has the right to be present at all critical stages of his or her trial. Koons v. State, 771 N.E.2d 685, 690 (Ind. Ct. App. 2002), trans. denied. Sentencing is a critical stage of the proceeding. Cf. Adams v. State, 693 N.E.2d 107, 109 (Ind. Ct. App. 1998) (recognizing that "sentencing is a critical state of the proceedings at which a defendant is entitled to representation by counsel"). A restitution order is part of the criminal sentence. McKenney v. State, 848 N.E.2d 1127, 1129 (Ind. Ct. App. 2006).

However, due process guarantees a defendant's right to be present only "if his presence would contribute to the fairness of the procedure." Hubbell v. State, 754 N.E.2d 884, 895 (Ind. 2001) (quoting Kentucky v. Stincer, 482 U.S. 730, 745 (1987)). "The

[3] The State argues that Estanislau failed to object to this order below, has therefore waived the issue on appeal, and is constrained to arguing that the trial court's restitution order constitutes fundamental error. We choose to address Estanislau's claim on its merits, and not under the more narrow fundamental error review. See Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005), trans. denied. We do so because of

defendant has the burden of showing how his presence could contribute to a more reliable determination of the fact at issue. If a defendant can contribute or gain nothing from attending the proceeding, then his due process right is not violated." Id.

Here, Estanislau has failed to meet his burden of demonstrating that his presence at the time the court issued the restitution order would have contributed to a more reliable determination. At his sentencing hearing, Estanislau heard the estimated restitution figures supplied by the State, and indicated that they seemed "about right." Tr. at 172-73. The amount of restitution the trial court ordered Estanislau to pay Member's Choice was the same amount indicated by the State at the hearing, and the amount ordered for Bloomfield State Bank was only $50 higher than that indicated at the hearing. Estanislau did not object when the trial court indicated that it would actually issue its restitution order after the State supplied more accurate figures, and he has wholly failed to explain how his presence when the trial court issued this order would have had any effect. As Estanislau's attorney stated at the hearing, the defense was "not in a position to challenge the claim for restitution." Id. at 172.

Estanislau has failed to demonstrate that he could have contributed anything to an additional hearing on restitution, or that he could have benefited by being present when the trial court issued the restitution order. Therefore, he has failed to show that the procedure through which the trial court ordered restitution violated his due process rights.

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our "strong preference to decide issues on their merits." Collins v. State, 639 N.E.2d 653, 655 n.3 (Ind. Ct. App. 1994), trans. denied.

Conclusion

We conclude that the trial court's denial of Estanislau's motion to withdraw his guilty plea did not result in manifest injustice, and that Estanislau was not denied due process when the trial court issued its restitution order.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.